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FEDERAL COMMUNICATIONS COMMISSION  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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In the Matter of )

Establishment of a Class A  
Television Service )  
\_\_\_\_\_) )

MM Docket No. 00-10

MM Docket No. 99-292

RM-9260

To: The Commission

**JOINT COMMENTS OF LARRY A. MILLER  
AND WORLD BROADCASTING, INC.**

Larry A. Miller ("Miller") and World Broadcasting, Inc. ("World Broadcasting," and, with Miller, "Joint Commenters"), by their undersigned attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. Section 1.415, hereby respectfully submit these Joint Comments with respect to the Commission's *Order and Notice of Proposed Rulemaking* in this proceeding ("*NPRM*"), FCC 00-16, adopted and released on January 13, 2000, 65 Fed. Reg. 3188 (published on January 20, 2000).

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## **Introduction**

In this proceeding, the Commission proposes rules regarding the establishment of Class A television station licenses, as required by the Community Broadcasters Protection Act of 1999 (the "CBPA"). <sup>1/</sup> The Commission has proposed, among other things, that Class A stations not be required to protect from harmful interference any proposed new primary analog television broadcasting station that is the subject of a pending application for a construction permit that had not been granted as of November 29, 1999. <sup>2/</sup> *NPRM* at Paras. 27-28. For the reasons set forth below, Joint Commenters urge the Commission to require Class A stations to protect any proposed new primary analog station that is the subject of an application for a construction permit that was pending on November 29, 1999.

## **Background**

Miller applied for a construction permit from the Commission authorizing him to build a new primary analog UHF commercial television broadcasting station to

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<sup>1/</sup> Community Broadcasters Protection Act of 1999, Section 5008 of Pub. L. No. 106-113, 113 Stat. 1501 (1999), Appendix 1, codified at 47 U.S.C. § 336(f).

<sup>2/</sup> The CBPA was enacted on November 29, 1999.

operate on NTSC Channel 45 at Lincoln, Nebraska on November 6, 1995. <sup>3/</sup> Through no fault of Miller, that application is still pending, more than four years later, and was pending on November 29, 1999. On July 24, 1996, World Broadcasting applied for a construction permit from the Commission authorizing World Broadcasting to build a new primary analog UHF commercial television broadcasting station to operate on NTSC Channel 51 at Lincoln, Nebraska. <sup>4/</sup> Again, through no fault of World Broadcasting, its application is also still pending, nearly four years later, and was pending on November 29, 1999. Accordingly, Joint Commenters have a keen interest in the interference protection to be afforded to the stations proposed in their respective pending applications.

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<sup>3/</sup> Application File No. BPCT-951106KP.

<sup>4/</sup> Application File No. BPCT-960724LG.

## Discussion

### **I. Protection of Proposed New Primary Analog Stations Not Authorized as of November 29, 1999 Is Permissible under the CBPA and Is Consistent with Congressional Intent.**

The *NPRM* proposes that Class A stations not be required to protect new primary analog stations specified in applications for construction permits that were pending, and not yet granted, on November 29, 1999.<sup>5/</sup>

The CBPA was enacted to protect low-power television broadcasting (“LPTV”) stations that “. . . provide video programming that is functionally equivalent to the programming [consumers] view on full-service stations . . . [by affording LPTV stations] roughly similar regulatory status.”<sup>6/</sup> However, rather than conferring upon Class A stations the “roughly similar” regulatory status that the CBPA envisions, the *NPRM* would provide pending applications for construction permits for new primary analog stations *less* protection from Class A stations than those applications would receive from subsequently-filed applications for construction permits for other new primary analog stations. Under the *NPRM*’s anomalous interpretation of the CBPA, applications for

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<sup>5/</sup> *NPRM* at ¶¶ 27-28.

<sup>6/</sup> Report 106-384, 106th Cong., 1st Sess.

construction permits for new primary analog stations that were pending on November 29, 1999 would receive even less interference protection from Class A stations than would applications for construction permits for new secondary analog LPTV stations and new secondary analog television broadcasting translator stations that were pending on that date.

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Such a result, even though it may be a permissible interpretation of the CBPA, is in no way required by the statute and would stand so thoroughly at odds with the concept of primary and secondary services as to be contrary to Congress's intent. 8/ Interpreted in congruity with other provisions of the statute and consistent with Congress's goal of establishing "roughly similar regulatory status" between Class A stations and primary television stations, Section 336(f)(7)(A)(i) should not be construed to provide pending applications for construction permits for new primary analog stations less protection from Class A stations than pending applications for construction permits for new secondary analog LPTV and translator stations will receive from Class A stations.

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7/ 47 U.S.C. § 336(f)(7)(B)(iii).

8/ Section 336(f)(7)(A)(i) only provides that Class A stations may not interfere with the predicted Grade B contour, as of November 29, 1999, of any primary analog station or with the predicted Grade B contour proposed in a "change application" for such a station that was pending as of that date. The statute does not preclude the Commission from adding to the classes of predicted Grade B contours that are protected from Class A stations those that are proposed in applications for construction permits for new primary analog stations pending as of November 29, 1999.

The protection Congress affords Class A stations is not absolute. For example, Section 336(f)(7)(A)(i) and (ii) provide that applications for construction permits to modify the facilities of primary analog stations that were pending on November 29, 1999 are protected from Class A stations and even some applications for construction permits for primary digital television broadcasting (“DTV”) stations filed *after* the date of the enactment of the CBPA are protected from Class A stations. It is therefore consistent with the CBPA for the Commission to protect pending applications for construction permits for new primary analog stations that were filed *before* the enactment of the CBPA.

**II. Protection of New Primary Analog Television Stations Proposed in Applications for Construction Permits that Were Pending on November 29, 1999 Is in the Public Interest.**

As the *NPRM* notes, LPTV stations provide service to small geographic regions and are often used for “niche” programming.<sup>9/</sup> On the other hand, primary or full-power stations serve entire communities, and thus offer unique service in the public interest. The Commission noted almost 18 years ago:

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<sup>9/</sup> *NPRM* at ¶ 3.

Generally, our broadcast rules and policies proceed from the assumption that broadcast stations serve the public interest when they meet the programming needs and interests of all elements of the community. . . . However, in light of the nature of the low power service, particularly the small and undefined coverage areas of low power stations, a concern that all elements of the larger community be provided with program service is not present. <sup>10/</sup> —

With the transition of certain LPTV stations from secondary to Class A status, the Commission must remain mindful of the unique public service that primary analog television stations provide to entire communities: free, over-the-air programming responsive to the needs of all of their viewers. While Congress has determined that Class A stations are entitled to some degree of protection from primary analog stations, Congress did not specifically require that this protection be applied at the cost of new primary analog stations that are proposed in applications for construction permits pending on the date of the CBPA's enactment. *See* note 8, *supra*. The public interest is better served when entire communities, such as Lincoln, Nebraska, are able to receive service from full-power television stations rather than when sub-parts of communities receive “the small and undefined coverage . . . of low power stations, [where] a concern that all

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<sup>10/</sup> *Inquiry into the Future Role of Low Power Television Broadcasting and Television Translators in the National Telecommunications System, Report and Order*, 51 Rad. Reg.2d (P&F) 476 ¶ 14 (1982).

elements of the larger community be provided with program service is not present.” <sup>11/</sup>       

Where, as here, the Commission possesses discretion to do so, it should promote the greater public good by ensuring that increasingly scarce television spectrum is used for full-power television service to entire communities rather LPTV-type service to small and undefined coverage areas.

**III. Equity Requires that Pending Applications for Construction Permits for New Primary Analog Stations Be Protected from Class A Stations.**

As the Commission is aware, numerous applications for construction permits for new primary analog stations have been pending at the Commission for years, through no fault of the applicants. As the Commission noted in its DTV proceeding, many applications for construction permits for new primary analog stations “. . . remained unprocessed pending the Commission’s resolution of fundamental policy questions relating to the comparative hearing criteria. These parties themselves did nothing to delay the processing of their applications and make themselves ineligible for initial DTV licenses. Therefore, where possible, it would be equitable to accommodate their desire to operate DTV facilities.” <sup>12/</sup>       

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<sup>11/</sup> *Id.*

<sup>12/</sup> *Advanced Television Systems and Their Impact upon the Existing*  
(continued...)



Similarly here, pending applicants for construction permits for new primary analog stations -- such as Miller and World Broadcasting -- did nothing to delay the processing of their applications. Yet, because their applications were not finally processed by the Commission as of November 29, 1999, the Commission now proposes to strip them of interference protection from Class A stations, some of which may not have even been applied for -- much less authorized or on the air -- at the time that the applications for the construction permits for the new primary analog stations were first filed with the Commission. Indeed, in an extreme case, where an alternative primary analog station channel could not be allotted to replace the channel for which the unprotected applicants for construction permits for new primary analog stations had filed, these applicants could see their years of time, effort, and investment completely erased by the *NPRM*'s proposed interpretation of the CBPA. Such a result, compelled neither by statute nor the public interest, would upset the expectations of the parties and would be unconscionable. The pending applicants for construction permits for new primary analog stations have pursued their applications, at significant expense, with the expectation -- based upon the Commission's rules -- that their applications would be entitled to full and fair consideration. By contrast, LPTV stations seeking to convert to Class A status were

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12/ (...continued)

*Television Broadcast Service, Memorandum Opinion and Order on Reconsideration of the Fifth Report and Order, MM Docket No. 87-268, 13 FCC Rcd. 6860 ¶ 12 (1998).*

licensed with the understanding that they would be required to avoid interference to primary analog stations specified in pending applications. The *NPRM*'s proposed interpretation of the CBPA would constitute a windfall to Class A stations at the expense of (i) applicants for construction permits for new primary analog stations who have been prosecuting their applications for years, and (ii) the public which their proposed new stations would serve. Equity demands that the Commission protect these applicants.

Respectfully submitted,

**LARRY A. MILLER and  
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